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No. 87-1404

In the Supreme Court of the United States

OCTOBER TERM, 1987

DAVID ISRAEL NAMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the testimony of two victims of petitioner's scheme to defraud should have been suppressed as the fruit of an unlawful search even though an independent investigation led to the discovery of those witnesses.

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OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's conviction (Pet. App. A1-A29) is reported at 835 F.2d 1084. The prior opinion of the court of appeals remanding for further findings on the admissibility of certain evidence (Pet. App. C1-C45) is reported at 680 F.2d 1088. The opinion of the district court on remand (Pet. App. B1-B21) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1988. The petition for a writ of certiorari was filed on February 19, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was con-

victed of wire fraud, in violation of 18 U.S.C. 1343; two counts of inducement of interstate travel in furtherance of a scheme to defraud, in violation of 18 U.S.C. 2314; and conspiracy, in violation of 18 U.S.C. 371. He was sentenced to 18 months' imprisonment on the conspiracy count. On the three substantive counts, he was fined a total of $21,000 and sentenced to three terms of 12 months' imprisonment, which were suspended in favor of three years' probation. The court of appeals reversed and remanded for further findings (Pet. App. C1-C45). The district court made additional findings and reinstated the convictions (*id.* at B1-B21). The court of appeals affirmed (*id.* at A1-A29).

1. The evidence at trial and at the suppression hearing showed that petitioner was the president of Financial Management Services, a mortgage brokerage company that obtained commitments for permanent, long-term financing for building projects. These commitments for permanent financing enabled the developers to obtain temporary construction loans from other sources. Petitioner charged large fees, payable in advance, for his company's service. He arranged for loan commitments for his clients with Sinton Service Corporation, an insolvent mortgage company, knowing that Sinton would not be able to make the loans when the construction projects were completed. The indictment pertained to three such transactions. Petitioner arranged for permanent financing for Tropic Sales and Development, a real estate project in Florida operated by Richard Gazie and Terry Ziegler. He also obtained a loan commitment from Sinton for Astro Bowling Center, a bowling alley project in Texas operated by Louis LaDuke. And he obtained a loan commitment for a proposed dry dock facility in Louisiana involving Gilmar Marine. Pet. App. A3-A7.

In late 1976, several victims of petitioner's scheme complained to the Orleans Parish district attorney's office. Louis LaDuke of Astro Bowling complained to the local authorities in November 1977. Thereafter, local law enforcement officers searched petitioner's offices pursuant to a warrant. During the course of the search, the officers found, among other things, the Tropic Sales loan commitment. Pet. App. A7-A8. That search was later held to be illegal on the gound that the warrant affidavit had mischaracterized part of the factual background of the investigation (*id.* at C44).

Also in 1977, the FBI in Dallas was independently investigating Sinton Services. In the course of this investigation the FBI discovered the loan commitment to Gilmar Marine. As part of the Dallas investigation, an FBI agent interviewed a representative of Gilmar. An attorney for Gilmar had also provided information regarding petitioner and Sinton Services to the FBI in Pittsburgh. Before those individuals came forward, the Dallas and Pittsburgh FBI offices were not aware of the state investigation of petitioner. Pet. App. A9-A10.

On February 27, 1978, a federal grand jury in the Eastern District of Louisiana subpoenaed the evidence that the State had gathered in its investigation (Pet. App. B5). On March 9, 1978, LaDuke gave FBI agents in New Orleans information identifying petitioner's bank account. That same day, the federal grand jury subpoenaed petitioner's bank records. *Id.* at A11.

The FBI conducted an analysis of petitioner's bank records and identified more than 40 suspect transactions. Among the suspect transactions were a $22,000 wire transfer from Tropic Sales to petitioner's company dated July 1, 1977, and a $14,200 wire transfer a few days later to the account of Sinton Services, referencing a Tropic Sales commitment. After those wire transfers were discovered,

New Orleans FBI Agent Rollen Powell contacted agents in Miami and requested that they interview Gazie and Ziegler. Pursuant to that request, Miami agents interviewed those two men on June 15, 1978. At the interview, they provided the FBI with a copy of the Tropic Sales loan commitment from Sinton, and they told the FBI that they had advised petitioner on August 2, 1977, that Sinton was insolvent. Pet. App. A11-A12.

2. Before trial, petitioner moved to suppress the evidence seized during the 1977 state search of his offices and the evidence derived from that search. The district court denied the motion. Pet. App. C9. Gazie and Ziegler then testified at trial that they had advised petitioner that Sinton was insolvent on August 2, 1977. The jury convicted petitioner on counts pertaining to the Astro Bowling and Gilmar Marine loan commitments, which were made after August 2. The jury acquitted petitioner on counts pertaining to the Tropic Sales commitment, which was made before August 2. *Id.* at A6-A7, A12, A14.

The court of appeals initially reversed petitioner's convictions on the ground that the 1977 state search in petitioner's office was illegal (Pet. App. C1-C45). The court remanded the case to the district court for a determination whether evidence that was discovered in the illegal search was nevertheless admissible under theories of inevitable discovery, attenuation, or independent source. The court of appeals also instructed the district court to determine whether the improper admission at trial of any of the fruits of the illegal search was harmless error. *Id.* at C39-C40.

3. On remand from the court of appeals, the district court found that the evidence identified by petitioner as the fruit of the illegal search, including the testimony of Gazie and Ziegler, was properly admitted at trial (Pet. App. B1-B21). The court made a factual finding that "it is

normal procedure in cases such as this" to trace the money provided to the suspect by his victims and to subpoena the suspect's bank records (*id.* at B13). The court also found that "the obtaining of bank records to trace the funds received from victims is a normal investigative step in cases such as this" (*id.* at B14). In addition, the court found that the decision to interview the principals of Tropic Sales was "based upon a deposit item in the bank records obtained through [the] subpoena" (*id.* at B6) and that the bank records were "the source of the lead to locate Tropic Sales" (*id.* at B15). The court found that the unsolicited complaints by petitioner's victims "constitute[d] leads in the possession of the government which by virtue of ordinary investigation would inevitably lead Federal authorities to subpoena [petitioner's] bank records and thereby discover[] the deposit" linking Sinton Service and Tropic Sales (*id.* at B14-B15). The court further found that any causal link between the search and the testimony of Gazie and Ziegler "was sufficiently attenuated as to remove any possible taint arising from the search" (*id.* at B17).

The court of appeals affirmed (Pet. App. A1-A29). The court held that the record contained sufficient evidence to support the district court's rejection of petitioner's factual contention that "because of the tainted information the FBI focused on Tropic Sales and ferreted out the damning evidence of Gazie and Ziegler" (*id.* at A15). In rejecting petitioner's contention, the court found that the testimony in the record "reflects adequate support for the finding that [FBI Agent Powell] routinely set the Tropic Sales lead along with several others after analyzing the bank records" and "did not use the tainted Tropical Sales commitment" in determining that Gazie and Ziegler should be interviewed (*id.* at A16). The court wrote that "[t]here were at least two pertinent FBI investigations proceeding

simultaneously. The evidence is sufficiently persuasive that the agents ultimately would have examined all obvious Sinton contacts. Once [petitioner's] bank records were displayed, that contact was apparent and routine investigatory procedures could and did lead to Gazie and Ziegler" (*id.* at A22). Thus, "the government had carried its burden of showing by a preponderance of the evidence that the discovery of Gazie and Ziegler was inevitable" (*id.* at A23).

ARGUMENT

Petitioner contends that the testimony of Gazie and Ziegler should have been suppressed as the fruit of the illegal search of his office in 1977. Both courts below properly rejected this claim, because there was no causal connection between the illegal search and the trial testimony of Gazie and Ziegler. See *Segura* v. *United States*, 468 U.S. 796, 815 (1984) ("not even the threshold 'but for' requirement was met in this case"); *United States* v. *Crews*, 445 U.S. 463, 471 (1980) (the challenged evidence must be "in some sense the product of illegal government activity"); cf. *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

The evidence showed that the various law enforcement agencies investigating this case learned about Tropic Sales, which was represented by Gazie and Ziegler, from two distinct sources: the loan commitment obtained in the 1977 search of petitioner's office, and the bank records obtained by subpoena in 1978 after LaDuke gave the FBI information identifying petitioner's account. It was the bank records, rather than the search, that ultimately led the agents to Gazie and Ziegler. Agent Powell examined the bank records and found wire transfers connecting Tropic Sales to petitioner and Sinton Services. On discovering that wire transfer, Agent Powell contacted the FBI's

Miami office and requested that agents there interview Gazie and Ziegler. Following their interview in Miami, Gazie and Ziegler voluntarily agreed to appear as government witnesses in this prosecution.

Although petitioner renews in this Court his contention that the bank records might not have led to an interview of Gazie and Ziegler if Agent Powell had not had "an eye practiced by its pre-existing awareness of the significance of Tropic Sales" (Pet. 36), that contention is a factual one that was rejected by both courts below. As the district court found, the link between Tropic Sales and Sinton Services that was established by the bank records was sufficient to cause further investigation of Tropic Sales as a matter of routine (see Pet. App. A16, B13).[1] In these circumstances, the trial testimony of Gazie and Ziegler is not in any sense the fruit of the illegal search of petitioner's office.

Petitioner is incorrect in asserting that the mere fact that the government first obtained information relating to Tropic Sales during the illegal search is a basis for suppressing the testimony of Gazie and Ziegler. "[F]acts improperly obtained do not 'become sacred and inaccessi-

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[1] Agent Powell testified about his activities following his examination of the bank records as follows: "I was setting leads from all over the United States. In fact, it did not stick out at all, the fact that we had a Tropic Sales commitment. We had commitments from several other institutions, and there were twenty-five or thirty people that had made complaints to us—maybe not that many. I'm sorry for exaggerating. There were about fourteen or fifteen, and this was one of many. As I said, I was setting leads to determine—to obtain the facts and circumstances behind every issuance of money that Namer received, and Tropic Sales was one of them." 14 Tr. 340-341. In light of petitioner's wholly unsubstantiated contention (Pet. 34 n.4) that Agent Powell "notably changed his testimony from 1980," it is significant that this testimony came on cross-examination by petitioner's counsel in 1980, not at the 1986 taint hearing.

ble.' " *Nardone* v. *United States*, 308 U.S. 338, 341 (1939) (quoting *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920)). The pertinent question is whether there is a sufficient causal connection between the constitutional violation and the evidence at issue to warrant its suppression. *United States* v. *Ceccolini*, 435 U.S. 268, 274 (1978). As the facts recited in the opinions below show, there was no causal connection here.

Moreover, suppression of live testimony is particularly inappropriate when the witnesses are the defendant's victims, as in this case. Gazie and Ziegler were more than willing to testify on behalf of the government. As this Court recognized in *Ceccolini*, 435 U.S. at 276, "[t]he greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means." And because the cost of excluding live-witness testimony is so great, the Court has required a "more direct link" between the illegality and the testimony than is required for physical evidence (*id.* at 278). In this case, petitioner's theory is that the FBI would not have contacted Gazie and Ziegler on the basis of the bank records if the Tropic Sales loan commitment had not been discovered illegally. Even if that theory had not been expressly rejected by the courts below as a factual matter, the causal relationship between the search and the testimony of Gazie and Ziegler would be so attenuated that suppression would be inappropriate.

Relying on *United States* v. *Owens*, 782 F.2d 146 (10th Cir. 1986), and *United States* v. *Satterfield*, 743 F.2d 827 (11th Cir. 1984), cert. denied, 471 U.S. 1117 (1985), petitioner contends (Pet. 30-32) that the Tenth and Eleventh Circuits would have suppressed the testimony of Gazie and Ziegler, without first requiring any factual finding of a causal link between the illegal search and the interview of

those witnesses, merely because a number of the independent investigative steps that led to that interview occurred after rather than before the illegal search that first identified Tropic Sales. Contrary to petitioner's contention, there is no conflict between the decision in this case and the Tenth and Eleventh Circuit decisions in *Owens* and *Satterfield*.[2] The Tenth Circuit in *Owens* did not insist on any particular temporal relationship between the legal and the illegal investigative steps but only insisted on "an *independent* investigation" (782 F.2d at 152 (emphasis in original)). The *Owens* court rejected as a factual matter the government's "highly speculative assumption of 'inevitability' " (*id.* at 153).[3] In this case, the district court and the court of appeals found that the interview of LaDuke, the subpoena of the bank records, and the consequent interview of Gazie and Ziegler constituted a line of investigation independent of the illegal search, because all of those routine steps would have been taken whether or not federal officials also knew from the seized loan commitment that Tropic Sales was one of petitioner's victims. As the courts below found, the government's assertion of inevitability was not at all speculative.

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[2] Petitioner also appears to assert that the decision below conflicts with other decisions of the Fifth Circuit (Pet. 27-30). Any such intracircuit conflict would be a matter for the Fifth Circuit, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). Petitioners, however, did not seek rehearing or rehearing en banc in the court of appeals.

[3] The government in *Owens* argued that a motel maid probably would have found the contraband at issue in the case and probably would have alerted the police if the police had not first illegally entered the motel room where the contraband was found. The court observed that the maid would not necessarily have found the contraband and would not necessarily have called the police. 782 F.2d at 152-153.

The Eleventh Circuit in *Satterfield* was confronted with a situation in which the government claimed it would inevitably have obtained a warrant and searched certain premises legally if it had not first searched them illegally without a warrant. The court insisted that the government prove its assertion by means of a demonstration that "the police possessed and were pursuing a lawful means of discovery at the time the illegality occurred" (743 F.2d at 846), because in its view "a contrary holding would practically destroy the requirement that a warrant for the search of a home be obtained *before* the search takes place" (*ibid.* (emphasis in original)). The rationale of *Satterfield* has no application to the quite different facts of this case. This case does not involve physical evidence that the government claims it would have found legally if it had not first found the exact same evidence illegally. Instead, this case involves individuals who were in fact identified and pursued as a result of legal investigative steps, even though the same individuals could have been identified and pursued as a result of earlier, illegal investigative steps. To suppress evidence in this situation, given the lack of causal connection between the illegal search and the evidence ultimately obtained, would amount to holding that an illegal search renders all evidence that was or could have been obtained by exploiting that illegality "sacred and inaccessible," contrary to *Silverthorne Lumber*, 251 U.S. at 392, and it would ignore the distinction that this Court drew in *Ceccolini*, 435 U.S. at 276-279, between inanimate evidence and live testimony. There is no reason to believe that the Eleventh Circuit would extend *Satterfield* so far.[4]

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[4] Similarly, there is no need to hold this case pending the decision in *Murray* v. *United States*, No. 86-995, and *Carter* v. *United States*, No. 86-1016 (consolidated; argued Dec. 8, 1987). The *Murray/Carter*

In any event, the *Satterfield* court cited with approval the decision in *United States* v. *Brookins*, 614 F.2d 1037 (5th Cir. 1980), which upheld the admission of a witness's testimony "because lawful police inquiries that were already 'set in motion' probably would have disclosed the witness' identity" (743 F.2d at 846 (quoting 614 F.2d at 1048)). In this case, LaDuke's complaints to the state authorities, and the independent prior complaints to both state and federal authorities, were the factors that led to both the illegal search and the legal line of investigation consisting of the March 8 interview of LaDuke, the subpoena for the bank records, and the interview of Gazie and Ziegler based on what those records disclosed. Thus, even *before* the illegal search took place, the independent legal line of inquiry that actually led to the evidence had already been "set in motion," which is all *Satterfield* requires.

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case involves two searches, a warrantless search assumed to be illegal and a subsequent warrant-authorized search, both conducted by the same group of police officers in the same building and leading to the discovery of marijuana. Even if the Court were to determine that the two searches in the *Murray/Carter* case were so interconnected that suppression of the marijuana is required, or that the underlying purposes of the Warrant Clause justified an exception in that case to the general rule that evidence will not be suppressed unless its acquisition was causally connected to some illegal action by the government, it would not follow that anything should be suppressed in this case. The findings of the courts below demonstrate the lack of any causal connection between the illegal search and the discovery of witnesses in this case, and the concerns about evasion of the Warrant Clause that have been stressed by the petitioners in the *Murray/Carter* case are not implicated by the facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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